Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00870/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 April 2016	**On 18 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MR JOAQUIM GODINHO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Tobin, Counsel instructed by Cale Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought with permission from Upper Tribunal Judge Storey granted on 18 March 2015. It relates to a decision of First-tier Tribunal Judge Gibbs promulgated on 10 November 2014. It concerns an order made for the deportation of the appellant following a criminal conviction in the Crown Court at Croydon.

2. The grounds on which permission was granted were threefold: first that the judge made an error of law in failing properly to articulate and apply the imperative grounds of protection and in the circumstances did not appreciate the high threshold which was required; secondly that in relation to the judge's approach, no distinction was made between the two separate tests which apply depending upon whether the individual has been resident in the UK for five or for ten years; and thirdly that the judge did not adopt the structured approach to

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questions of this type as has been commended by **MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 392 (IAC)**.

3. A letter dated 27 April 2015 which constituted the respondent's Rule 12 response was ambiguous. It read: "The Secretary of State does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal. In line with the grant of permission case law does leave it open for the points to be argued." Clearly it was not simply a concession that permission be granted because that had already taken place.

4. Mr Tarlow, who represents the Secretary of State, took instruction and confirmed that the letter was intended to convey an acknowledgment that the grounds set out in the application for permission to appeal amounted to errors of law and that in the circumstances the Secretary of State conceded that the appeal should be allowed. As will become apparent, it is unnecessary for me to say any more at this stage about the detail of those errors. The judge failed to adopt the proper approach and to construe and apply the imperative grounds threshold correctly, as is more fully explored and explained in the second part of this decision.

5. With the concurrence of both the appellant's representative and the representative of the Secretary of State, I therefore set aside the decision of the First-tier Tribunal and remake the decision. The appellant gave evidence before me. He confirmed the truth of a witness statement that was put before the First-tier Tribunal, running to some fourteen paragraphs. It concludes with a statement that he is not a dangerous man and should be given a second chance.

6. The appellant's partner, Ms Marzena Flaga, also gave evidence before and she confirmed the truth of her eleven paragraph witness statement. She was asked one question by way of cross-examination, namely whether in the event of the appellant being deported she would follow him to Portugal. She answered that question in the affirmative. It was common ground before me that the issue for my determination was whether an expulsion decision in respect of the appellant had been properly made based upon the imperative grounds of public security as prescribed in Directive 2004/38/EC.

7. The appellant is a citizen of Portugal, born on 1 February 1971. He arrived in the UK in May 1993. On 28 January 2014, he was convicted of an offence of causing a female to engage in sexual activity without consent. He was sentenced to 21 months' imprisonment, was made the subject of a sexual prevention order and was placed on the sex offenders' register for ten years.

8. It is conceded by the respondent that the appellant has acquired a right of permanent residence in the UK. In assessing the appellant's deportation to be warranted on imperative grounds of public protection, the Respondent placed weight upon the assessment of risk of the Multi Agency Public Protection Arrangements, and the appellant's inclusion in the sex offenders register. She had regard to the sentencing remarks of the judge and to the affect that although NOMS1 assed the appellant as at a low risk of reoffending, there was a high risk of harm should he reoffend.

7. Regard must be had to the Immigration (European Economic Area) Regulations 2006 which implement the Directive. Regulation 21 provides as follows:

"(1) In this Regulation a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under Regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision." (emphasis added)

8. It was conceded on behalf of the respondent that the appellant has indeed resided in the United Kingdom for a continuous period of at least ten years, having arrived in May of 1993. That being the case it is the higher test under sub-section 4 which must be satisfied and not the lower test under sub-section 3. Ms Tobin, who represents the appellant, comments, however, that the facts of this case are such that even were the lower threshold test to be applied it would not in any way serve to permit the deportation of the appellant.

9. These tests have been discussed in a number of decisions, both of this Tribunal and of the Court of Justice of the European Union. I have been taken to **Land Baden-Württemberg v Tsakouridis (Directive 2004/38/EC) Case C-145/09**. That is a decision of the Grand Chamber of the Court of Justice of the European Union and deals with a Greek national resident in the Federal Republic of Germany whose government took the decision to expel him because of his involvement in the narcotics trade. The particular facts of that case are some way distant from the facts here but principles of general application can be drawn from the following paragraphs:

"41. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reasons'.

43. As regards public security, the court has held that this covers both a member state's internal and its external security.

44. The court has also held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.

45. It does not follow that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are necessarily excluded from that concept.

47. Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind [...] trafficking in narcotics as part

of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.

48. It should be added that Article 27(2) of Directive 2004/38 emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the member state concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.

49. Consequently, an expulsion measure must be based on an individual examination of the specific case and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host member state and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host member state."

10. It is submitted on behalf of the appellant and not challenged by the Respondent that inclusion on a sex offenders register and the automatic multi-agency involvement when classified under MAPPA level 2 are factors which can be seen as less strict means in those circumstances.

11. I have also had regard to the decision of the Court of Appeal in **State for the Home Department v FV (Italy) [2012] EWCA Civ 1199**. This case concerned an Italian citizen who was convicted in 2002 of manslaughter having strangled his victim with an iron. He was sentenced to 8 years imprisonment and had previous convictions for assaulting a police officer and various motoring matters. The Court found that the Tribunal had plainly erred in law in its approach to the expression "imperative grounds of public security". The form of words used by the Tribunal and condemned by the Court of Appeal read:

> "We conclude that the medium risk of the appellant killing again is a sufficiently serious threat to public security as to fall within the highest level of calculus within the regulations , and that there exist imperative grounds of public security for the decision to deport him. Regulation 21(4) is thus satisfied."

The facts relate that FV committed a number of other offences including battery and possession of a bladed article in 2011 and 2012.

12. As Pill LJ put it at paragraphs 98 and 99:

> "98. I see no real prospect of the Tribunal finding 'imperative grounds of public security' to justify deportation. The respondent has committed a serious offence of violence against the person justifying a sentence of 8 years imprisonment. He has committed other offences.

> 99. Notwithstanding those offences and the discretion permitted to a Member State in setting out its scale of values, a Tribunal applying regulation 21 and the guidance in *Tsakouridis* and *PI* could not in my judgment properly find that there are imperative grounds of public security justifying deportation. (I bear in mind the later offences of the respondent mentioned at paragraph 30 above.)

13. Finally I come to **MG Portugal** (above), where the criminal conduct related to offences of child cruelty in relation to which a 21 month prison sentence was imposed. The Secretary of State in that case conceded that if the individual was entitled to the highest level of protection based on ten years' residence as set out in Article 28(3)(a) (so that she could only be deported if there were "imperative grounds of public security") then her appeal must succeed because, on the facts, there were no such grounds. The court went on to consider the lower threshold under "serious grounds of public policy or public security" and concluded that on the facts this was not met.

14. The respondent's arguments before me today have placed reliance upon the decision letter of the Secretary of State dated 6 May 2014 giving reasons for deportation. Mr Tarlow took me in particular to paragraph 24 where it says:

> "In completing your NOMS assessment the offender manager found that you posed a high risk of harm to the young females. In assessing you as a high risk it is has been acknowledged that there are identifiable indicators of a risk of serious harm. That potential event could happen at any time and the impact would be serious."

15. There is also reference in paragraph 27 to the likelihood of distress to the family of the victim. The Secretary of State includes verbatim the sentencing remarks of the judge. To the extent that it is relevant those remarks are as follows:

> "Your victim was 16 years of age at the time, a particular vulnerable young lady in that she was alone, in a park, sitting on a bench minding her own business, she having been locked out of her home and was waiting for someone to come and let her back in. This was a park with which she was familiar, she felt safe where she was but you came, approached her, engaged her in conversation. And very shortly after that, in the park which was not busy at about 11 o'clock in the morning, you took her as far as a clump of trees, whereby you pushed against her and you made her masturbate you but at one stage you had hold of her, if not by her throat, certainly by the top of her neck, when you made her masturbate you.
>
> It is an aggravating feature of your behaviour that you ejaculated during the course of all this. I remember well her evidence in saying that this was an experience which she had never encountered before. And I witnessed with my own eyes just what an effect this had on upon her.
>
> I balance your terrible offending against the following mitigating features. You are a man with nothing in the way of like offending recorded against you. It is clear from me from what I have read in the presentence report that you were at the time suffering from depression. You have had a difficult background of late, having lost both your parents. And it is right that I record the fact that you had, in fact, been unwell, prior to the commission of this offence. You have a history of self-harm, you have a history of battling against depression. It is right that I note that your poor health is something that has been mentioned throughout the reports I have seen."

16. In addition, within the sentencing remarks the following appears:

> "And I am asked to consider in terms whether indeed you pose a danger to the public. In these circumstances dangerousness has got a very definite meaning as defined in law. And bearing in mind the matter of which you have been convicted and ignoring that of which you have been acquitted, I cannot, as a matter of law, properly conclude that you do fall to be treated as a dangerous offender."

17. The other matter which I was taken to specifically was in the NOMS form where it is recorded that the risk of serious harm is high:

> "The appellant has been convicted of a sexual offence committed against a very young female. It appears that he targeted the victim who was sitting alone in a public park. He displays a very high level of denial and victim blaming behaviour. He has no empathy for the victim. He used force to restrain the victim. The fact that this was a public park in the middle of the day did not deter Mr Godinho from committing the offence. He poses a risk to females of a similar age who may be in a situation where they are alone in a public place."

18. However, the counsel for the respondent did not dissent from or argue against any of the submissions on law made by counsel for the appellant. The following propositions emerge and do not appear to be controversial:

(1) Deportation decisions concerning EEA nationals must be made by reference to the Regulations;
(2) The threshold which must be satisfied varies depending upon whether the individual concerned has been resident in the UK for less than 5 years; between 5 and 10 years; or more than 10;
(3) If an EEA national has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision then the highest threshold must be reached, namely imperative grounds of public security;
(4) 'Imperative grounds of public security' import something considerably more serious than isolated acts of criminal conduct.

19. The matters relied upon by the respondent in this case do not begin to come within the territory of imperative grounds of public security properly interpreted. There is no substantial risk to public security. This was an isolated criminal offence which has not been repeated. I also consider there to be considerable force in Miss Tobin's submission that the matters relied upon by the respondent are insufficient even to meet the lower threshold of 'serious grounds of public policy or public security'. However, I am not required to decide the point because the appellant's length of residence in the UK engages the higher threshold and the point is purely academic.

20. The deportation order should be quashed.

Notice of Decision

The appeal from the First-tier Tribunal is allowed and the decision set aside.

The decision is remade, allowing the appeal and quashing the deportation order.

No anonymity direction is made.

Signed *Mark Hill* Date 12 May 2016

Deputy Upper Tribunal Judge Hill QC